

IN THE  
**United States Circuit Court**  
**of Appeals for the** 7  
**Ninth Circuit**

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation, Plaintiff in Error,  
vs.  
PETER SANDBERG and MATHILDA SANDBERG, his Wife, Defendants in Error. } No. 2951.

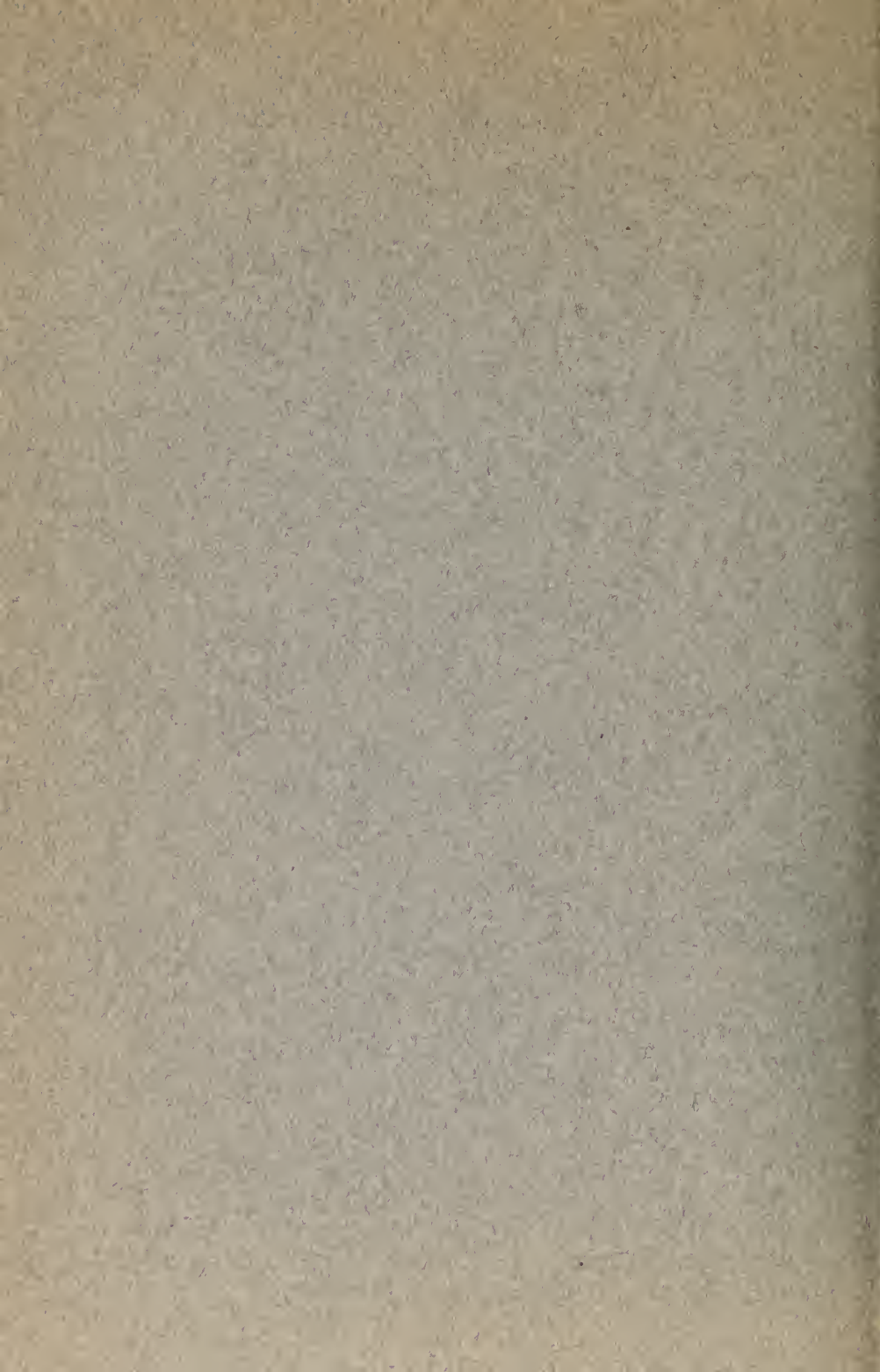
**Petition for Rehearing**

WILLIAM C. BRISTOL  
For Appellant

**Filed**

SEP 4 - 1917

F. D. Monckton,  
Clerk



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Defendants in Error.

} No. 2951.

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Petition for Rehearing

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TO THE HONORABLE JUDGES OF THE UNITED STATES  
CIRCUIT COURT OF APPEALS FOR THE NINTH  
CIRCUIT:

American Surety Company, plaintiff appel-  
lant, feeling itself aggrieved herein by the de-  
cision, judgment and opinion of this Court given  
and rendered on Monday, the 20th day of Aug-  
ust, 1917, respectfully presents this its petition  
for rehearing and for cause and ground thereof  
doth respectfully show and present:

*First:*

The appellant submitted to this Court the particular features of the indemnity agreement or contract upon which the right of recovery was based, as follows, to-wit:

“VIII. That the Surety shall, at its option, have and may exercise, in the name of the indemnitor, or otherwise, any right, or remedy, or demand which the indemnitor may have for the recovery of any sums paid by the Surety by virtue of its suretyship, and together with all other rights and remedies and demands, which the indemnitor has or may have in the premises, all of which rights and remedies and demands the indemnitor hereby assigns to the Surety, with full power and authority to said Surety, in the name of the indemnitor, or otherwise, as it may be advised, and as attorney for such indemnitor, to do anything, which the indemnitor might do, if personally present, if this instrument were not executed, and the indemnitor hereby appoints said Surety as its attorney for such purpose.”

\* \* \* \* \*

“X. That the Surety also looks to and relies upon the property of the indemnitor and the income and earnings thereof, and shall also at all times have the right to rely upon, look to, and follow and recover out of the property which the indemnitor now has or may hereafter have, and the income and earnings thereof, for any-



thing due or to become due it, the Surety, under this agreement, such suretyship having been by the Surety entered into for the special benefit of the indemnitor and the special benefit and protection of the indemnitor's property, its income and earnings; the indemnitor being substantially and beneficially interested in the award and performance of such contract and obtaining such suretyship."

(See Record, pp. 24 to 26.)

covered by the 2nd Assignment of Error (Record, p. 257), and by the 12th Assignment of Error (Record, p. 261), and by the 29th Assignment of Error (Record, p. 268).

As well as in the assignments of the refusal of the Court to find the facts as requested in these particulars by the plaintiff and to make conclusions of law in these particulars as requested by the plaintiff.

The specific point being as set forth in the record as cited and in the brief (page 3 and following) and at pages 41, 44 and 45. The Court's attention is particularly directed to page 45 of the brief on this point.

The plaintiff in error respectfully submits that the Court's opinion goes upon the theory that because the lower Court has found certain facts and this Court is satisfied with the facts so found that the judgment is affirmed.

The trouble with this solution of the matter

is that the plaintiff in error submitted the legal proposition in two phases:

*First:*—If Sandberg did take as agent for the community indemnity then under his agreement with plaintiff in error that indemnity inured to it.

*Second:*—That when Sandberg as agent of the community signed the indemnity agreement saying that “such suretyship having been by the surety entered into for the special benefit of the indemnitor and the special benefit and protection of the indemnitor’s property, its income and earnings,” and upon faith of such a statement the plaintiff in error did execute its bond and did incur liability that the Court as a matter of law was required to enforce that agreement regardless of any other feature of the case.

*Second:*

It was moreover submitted to your Honors that however much indemnity Sandberg took for his own protection that indemnity under clause VIII of the indemnity agreement was necessarily assigned to the plaintiff in error, for the language of that particular clause of the indemnity agreement signed by Sandberg is as follows:

“together with all other rights and remedies and demands which the indemnitor has or may have in the premises, all of which rights and remedies and demands the indemnitor hereby assigns to the surety.”

The record in this Court was prepared to sub-

mit and we respectfully insist that it did submit the legal proposition that after the plaintiff in error had put in its documentary evidence that upon the indemnity agreement signed by Sandberg alone liability followed against the community by reason of clauses VIII and X set out on pages 2 and 3 of the brief heretofore submitted to the Court.

The Court in its opinion obviously has this matter in mind because it distinctly quotes Sections 5917 and 5918 of Remington's Code and Statutes of the State of Washington as to the husband's management and control of the community real and personal property.

Indeed, there is no doubt of the husband's authorized agency by statute to act in all respects for the community.

*Third:*

So the proposition which is not decided or disposed of by this Court in its opinion filed on the 20th day of August herein is:

Whether as matter of law the husband who as agent for a community estate managing all of its property, and the evidence confessedly establishing that there was no other property whatsoever and that the husband had no individual property of his own, can with the solemnity with which these engagements were intered into sign a declaration, contract and statement of the weight and character herein appearing without any effect to bind the community?

What indemnity amounts to will always remain an open question in Washington unless this question is decided.

It is respectfully submitted that this question has not been decided on the record submitted to this Court.

Moreover, the attention of your Honors is respectfully asked to consider that when a court tries a case sitting as a jury its findings of fact are not entitled to any more sanctity or respect than those of a jury under similar circumstances.

In this case there were and are many assignments of error distinctly calling this Court's attention to the action of the Court below in excluding evidence from consideration which showed or tended to show or establish the contrary of the very things which the Appellate Court now says in its opinion were found by the trial Court.

*Fourth:*

This Court adopts the findings of the Court below apparently without consideration of the following assignments of error:

The third assignment which presented the matter that the Court rejected evidence of the knowledge of Mathilda Sandberg.

The fourth assignment that the Court rejected evidence of Mathilda Sandberg derived from her admissions made in interrogatories.

The seventeenth assignment relating to the rejection of evidence and in considering improper evidence.

The eighteenth assignment concerning the



Court's error in refusing to consider the testimony of the witness, Lund.

The nineteenth to twenty-third assignments of error relate likewise to rejection by the Court of competent evidence.

The twenty-fourth assignment of error (record, p. 265) sets forth *in extenso* the very proceedings which related to the matter of Peter Sandberg's actual holding of the stock in the Wells Construction Company and the delivery of it to his attorneys, Messrs. Bates, Peer & Peterson, who are confessedly the attorneys of Mrs. Sandberg. (Record, p. 266; middle of p. 195).

The application of these assignments of error referred to and which it seems the Court has entirely overlooked are very readily illustrated by examination of the proceedings on record, pages 183 to 191.

The Court's attention is particularly called to the matter on page 189 of the record.

The twenty-fifth and twenty-sixth assignments of error raise the specific questions on findings tendered to the Court and refused by the Court; conclusions of law tendered and refused by the Court; and exceptions to failure so to find and in finding as the Court did.

It is therefore respectfully submitted as impossible to conceive how this Court, without passing upon these questions, could, if it had examined the record, affirm all these proceedings and find no error.

It is thought that the Court, in writing the opinion that it has written, could not have investigated these questions because nothing is said

about them in the opinion save in so far as they are covered by the general statement in the opening words, "*We find no ground to disturb the findings of fact of the court below,*" and in the closing words, "*Upon the facts as found by the court below, and the law as it is established in the State of Washington, we find no error in the decree which is appealed from*"; both of which propositions, however, entirely disregard succinct and pointed references to refusals to consider testimony to disregard offers to show facts upon which the opinion now turns and to consider course of proceedings which were prejudicial to the plaintiff in error.

If the Court will take the pains to examine (as it may not yet have had time to have done) record, pages 245, 247, 249, 250 and 251, there will appear proceedings upon the very matters upon which the opinion for affirmance has turned and from which it will appear that the action of the Court below was prejudicial to the plaintiff.

If for no other reason by the action of the Court below in excluding testimony relative to Mathilda Sandberg's knowledge and in excluding the testimony of Lund on the very points that the opinion of the Court now turns there should be a rehearing; and it is so respectfully requested and submitted.

WILLIAM C. BRISTOL,  
Attorney for Appellant.

August 27, 1917.

## CERTIFICATE OF COUNSEL.

UNITED STATES OF AMERICA, }  
 State and District of Oregon. } ss.

I, the undersigned, do hereby certify that I am counsel for the appellant, petitioner for rehearing in the above entitled cause and Court; that I prepared the foregoing petition for rehearing and that it is not interposed for delay, inconvenience or embarrassment; that in my judgment the grounds and reasons therein stated for the rehearing are well founded.

WILLIAM C. BRISTOL,  
 Counsel for Petitioner.

